Supreme Court, U.S.

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No. ____

In The

Supreme Court of the United States

October Term, 1997

GLORIA GISCH,

Petitioner,

vs.

EXTENDACARE HEALTH SYSTEMS, INC. AND T² MEDICAL, INC.,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals For The Fifth District Of Texas At Dallas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the issuance of permanent injunctive relief in an employment discrimination case requires evidence of past discrminatory acts or the probability of future discriminatory acts under 42 U.S.C.A. §2000e-5(g)

2. Whether a jury finding of sexual discriminatnion by an employer and awarding of injunctive relief by the court gives Petitioner prevailing party status to authorize an award of attorney's fees and court costs.

3. Whether the Court of Appeals failed to apply the correct standard of review to the trial court's judgment awarding a permanent injunction.

LIST OF ALL PARTIES

Counsel of record for Petitioner certifies that the following persons or entities are parties to these proceedings:

Petitioner (Appellee in the court of appeals and Plaintiff in the trial court):	Gloria M. Gisch 1406 W. Pleasant Run Road DeSoto, Texas 75115
Respondents (Appellants in the Court of Appeals and Defendants in the trial court)	Extendacare Health Systems, Inc. 1121 Alderman Drive Alpharetta, Ga. 30202 T^2 Medical, Inc. 1121 Alderman Dr. Alpharetta, Ga. 30202 (Subsidiary of Extendacare Health Systems, Inc.)

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Gloria Gisch, respectfully prays that a Writ of Certiorari issue to review her employment discrimination case under Title VII, 42 U.S.C.A. §2000e, et seq. (Supp. 1973) of the Civil Rights Act, in a judgment of the Court of Appeals for the Fifth District of Texas at Dallas entered on December 16, 1996, and denied review in the Texas Supreme Court on January 29, 1998 and March 5, 1998.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth District of Texas at Dallas is unpublished and reprinted in the appendix attached hereto (App. A).

The judgment of the trial court is unpublished and reprinted in the appendix hereto (App. B).

The denial of Petitioner's Application for Writ of Error in the Texas Supreme Court is reprinted in the appendix hereto (App. C).

The denial of Petitioner's Motion for Rehearing of her Application for Writ of Error in the Texas Supreme Court is reprinted in the appendix hereto (App. E).

JURISDICTION

This Court has jurisdiction of this case because the decision by the Court of Appeals for the Fifth District of Texas at Dallas entered on December 16, 1996, is incorrect

inasmuch as the appellate court did not correctly review the judgment awarding Petitioner relief under Title VII, denied her status as a prevailing party and reversed the trial court's award of attorney's fees and court costs.

This Court has jurisdiction and should grant this Writ and exercise its supervisory powers to correct this decision of the lower courts. The dates of those judgments are as follows:

a. A final judgment was entered by the 101st District Court of Texas in favor of Petitioner as the prevailing party for injunctive relief against further discrimination, attorney's fees of $250,000 and costs along with recovery of $9,530 for an invasion of privacy claim under state law. (App. B)

b. The judgment of the Court of Appeals for the Fifth District of Texas at Dallas modified the judgment of the 101st District Court on December 16, 1996, in an unpublished opinion (App. A). Petitioner's Motion for Rehearing was denied on February 18, 1997.

c. Petitioner's Application for Writ of Error to the Supreme Court of Texas was denied with the notation "Writ Denied" on January 29, 1998 (App. C).

d. Petitioner's Motion for Rehearing of Application for Writ of Error in the Supreme Court of Texas was overruled on March 5, 1998 (App. E).

The statutory provision relating to a Petition for Writ of Certiorari from a case involving a federal statute in state courts is 28 U.S.C.A. §1257.

STATUTES INVOLVED

The constitutional provisions, treaties, statutes, ordinances and regulations involved in this case are as follows:

a) "It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin," Title VII, 42 U.S.C.A. §2000e-2(a); and

b) Title VII, 42 U.S.C.A. §2000e-5(g) (Supp. 1973) of the Civil Rights Act (Appendix D).

STATEMENT OF THE CASE

Gloria Gisch, a licensed pharmacist, was terminated from her position at Extendacare Health Care Systems, now owned by T² Medical, Inc. (Respondents) and sought compensation in her pleadings for, among other things, wrongful discharge under Title VII, 42 U.S.C.A. §2000e, et seq., of the Civil Rights Act. The jury found unlawful

discrimination on the basis of her pregnancy. 42 U.S.C.A. §2000e-(k) The district court entered judgment prohibiting Respondents from engaging in any further discrimination and ordering them to eradicate past and present unlawful practices and awarding Petitioner reasonable attorney's fees of $250,000 and costs as the prevailing party. The jury awarded Petitioner $9,530 on her state court claim of invasion of privacy and the judge ordered the return of her confidential medical records. After viewing the testimony and assessing the credibility of the witnesses the trial judge implicitly found that the discrimination was intentional and that Petitioner was the "prevailing party" as defined by Title VII. He did this when he issued the injunction.

Instead of reviewing the actions of the trial judge for an abuse of discretion, the Court of Appeals for the Fifth District discussed the facts in detail and erroneously said on page A-14 of its opinion that "they must balance the equities and examine the record for a history of discriminatory practices, indications of future non compliance with the law, or the need to fashion relief to make appellee whole." (App. A-14) This examination of evidence is totally contrary to a line of cases setting forth the abuse of discretion standard of review for injunctive relief. Moreover, Title VII does not require this additional evidence before issuing injunctive relief. 42 U.S.C.A. §2000e-5(g) (App. D-1).

On page A-22 the Court of Appeals erroneously denied Petitioner prevailing party status under Title VII based on *Farrar v. Hobby*, 506 U.S. 103, 113 S.Ct. 566 (1992), a due process case that had nothing to do with employment discrimination, where the plaintiff sought

monetary damages only. No injunctive or declaratory relief was sought or granted. *Farrar*, 506 U.S. 108, 113 S.Ct. 571. Because she lost prevailing party status and part of her injunctive relief was vacated, the Court of Appeals denied Petitioner any attorney's fees or court costs. (App. A-22)

The lengthy discussion of the testimony by the Court of Appeals indicates the strongly contested nature of the issues. Such aggressive denial affirms Petitioner's position that the trial judge was in the best position to view all of this posturing and make a finding based on what was closest to the truth. Where there is a wide disparity in testimony, reasonable minds always differ as to the conclusions to be drawn. In the end, the jury and judge found discrimination by the Respondents despite their best arguments to the contrary. Forbidding this from happening again was the only logical and reasonable action the trial judge could take.

REASONS FOR GRANTING THE WRIT

I

THERE IS NO STATUTORY REQUIREMENT OF EVIDENCE OF PAST DISCRIMINATORY ACTS OR THE PROBABILITY OF FUTURE DISCRIMINATORY ACTS BEFORE INJUNCTIVE RELIEF CAN BE AWARDED UNDER TITLE VII, 42 U.S.C.A. §2000e-5(g) (Supp. 1973) OF THE CIVIL RIGHTS ACT.

The starting point for interpreting a statute is the language contained therein. *Albernaz v. United States*, 450 U.S. 333, 336, 101 S.Ct. 1137, 1141 (1981). Where the

legislative purpose is expressed in plain and unambiguous language, the duty of the courts is to give it effect according to its terms. *Andrus v. Sierra Club,* 442 U.S. 347, 356, 99 S.Ct. 2335, 2340 (1979); *United States v. Lexington Mill & Elevator Company,* 232 U.S. 399, 409, 34 S.Ct. 337, 340 (1914). Courts must give statutes their "natural and plain meaning." *National Life and Accident Insurance Co. v. United States,* 524 F.2d 559, 560 (6th Cir. 1975). And "where a statute plainly expresses the will of Congress in language that does not permit or require a strained interpretation, words thereof may not be distorted beyond their plain popular meaning." *Adams v. Morton,* 581 F.2d 1314, 1320 (9th Cir. 1978).

The applicable statute provides that once a finding of discrimination has been made, the court can issue injunctive and equitable relief as it deems appropriate. 42 U.S.C.A. §2000e-5(g) (App. D-1). It does not require evidence of other acts of discrimination by the same employer or the probability of future acts of discrimination. (emphasis added) Title VII permits the court to issue an injunction and any other relief it deems appropriate following a finding of intentional discrimination. 42 U.S.C.A. §2000e-5(g) (App. D-1). It can enjoin the employer from engaging in unlawful employment practices. *Id.*

"Congress has granted courts plenary equitable powers under both Title VII, 42 U.S.C.A. §2000e-5(g) (Supp. 1973) and section 1981" for fashioning appropriate remedies for employment discrimination. *Pettway v. American Cast Iron Pipe Company,* 494 F.2d 211, 243 (5th Cir. 1974), *appeal after remand,* 576 F.2d 1157, *cert. den.,* 439 U.S. 1115, 99 S.Ct. 1020 (1979); *Carter v. Shop Rite Foods, Inc.,* 463 F.Supp. 277 (N.D. Tex. 1977), *other proceedings,*

503 F.Supp. 680 (N.D. Tex. 1980). Civil rights violations in general permit the court to grant injunctions prohibiting same. *Dreyer v. Jalet*, 349 F.Supp. 452 (S.D. Tex. 1972), *affirmed*, 479 F.2d 1044 (5th Cir. 1973). Where there is discrimination in a Title VII case, injunctive relief is appropriate. *Mitchell v. Seaboard System R. R.*, 883 F.2d 451 (6th Cir. 1989); *Nanty v. Barrows*, 660 F.2d 1327 (9th Cir. 1981). "To the extent that the district court finds racial discrimination, it is under a duty to render a decree which will both eliminate past discrimination and bar discrimination in the future." *United States v. County of Fairfax, Va.*, 629 F.2d 932, 941 (4th Cir. 1980), *cert. den.*, 449 U.S. 1078, 101 S.Ct. 858 (1981).

"This Court has held that absent clear and convincing proof of no reasonable probability of further non compliance with the law, *a grant of injunctive relief is mandatory.*" *James v. Stockham Valves and Fittings Co.*, 559 F.2d 310, 354 (5th. Cir. 1977), *cert. den.*, 434 U.S. 1034, 98 S.Ct. 767 (1978) (emphasis added); *Cronin v. United Service Stations, Inc.*, 809 F.Supp. 922, 933 (M.D. Ala. 1992); *Abrams v. Baylor College of Medicine*, 581 F.Supp. 1570 (S.D. Tex. 1984). When the Plaintiff has prevailed there is no discretion to deny injunctive relief completely. *U.S. v. Gregory*, 871 F.2d 1239, 1246 (4th Cir. 1989), *cert. den.*, 493 U.S. 1020, 110 S.Ct. 720 (1990); *Grove v. Frostburg National Bank*, 549 F.Supp. 922 (D. Md. 1982). This includes instances when the plaintiff suffered no monetary damages. *EEOC v. New York Times Broadcasting Service, Inc.*, 542 F.2d 356, 361 (6th Cir. 1976). A company wide injunction is not an abuse of discretion. *EEOC v. Cosmair, Inc.*, 821 F.2d 1085 (5th Cir. 1987).

In a pregnancy discrimination case, "[o]nce a Plaintiff has established that her employment was terminated as a result of unlawful discrimination of her employer, a presumption in favor of full relief arises." *EEOC v. Corinth, Inc.*, 824 F.Supp. 1302, 1309 (N.D. Ind. 1993). "The fact that the EEOC has not alleged a pattern of discriminatory activity does not prevent this Court from issuing an injunction against further discrimination (citation omitted) . . . Accordingly, the Court will grant the EEOC's request for an injunction, enjoining Corinth from further engaging in practices which discriminate." *Id.* at 1323, *see EEOC v. FLC & Brothers Rebel*, 663 F.Supp. 864, 870 (W.D. Va. 1987), *affirmed*, 846 F.2d 70 (4th Cir. 1988).

Trial judges have broad equitable powers to fashion injunctive relief for violations of Title VII that will eliminate the effects of past discrimination. *Bouman v. Block*, 940 F.2d 1211, 1233 (9th Cir. 1991), *cert. den.*, 502 U.S. 1005, 112 S.Ct. 640 (1991). A judge may order injunctive relief where there are not sufficient assurances that the employer is unlikely to repeat its discriminatory act. (*Id.*).

T^2 conducted their defense in total denial as if Petitioner was not terminated. The judge and jury concluded otherwise in favor of her. T^2 knew full well that it was a violation of the law to discriminate against an employee due to her pregnancy. Injunctive relief against this type of behavior was mandatory in the mind of the trial judge, and there was no abuse of discretion on his part in granting it. The Court of Appeals has erred in vacating it based on their opinion that other acts of discrimination or the probability of future discriminatory acts must be proven.

II.

A PARTY IN A TITLE VII CASE WHO OBTAINS INJUNCTIVE RELIEF AND DAMAGES ON A STATE COURT CLAIM IS A PREVAILING PARTY AND ENTITLED TO ATTORNEY'S FEES AND COURT COSTS. 42 U.S.C.A. §2000e-5(k)

A person is considered a prevailing party if she succeeds on any significant issue in litigation which achieves some of the benefit the party sought in bringing suit. *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 1939 (1983). This definition of "prevailing party" was revisited in *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782, 109 S.Ct. 1486 (1989). If a plaintiff has succeeded on any significant issue in litigation which achieves some of the benefits sought in bringing suit, the Plaintiff has crossed the threshold to a fee of some kind. *Id.* at 792, 1493.

A significant issue is seeking and obtaining injunctive relief in an employment discrimination case. *Ruffin v. Great Dane Trailers*, 969 F.2d 989 (11th Cir. 1992), *cert. den.*, 507 U.S. 910, 113 S.Ct. 1257 (1993). In that case, analogous to this one, Ruffin sought damages and injunctive relief. The trial court found in his favor on only one of four claims of discrimination and issued an injunction but awarded no damages. In fighting the award of attorney's fees, the employer argued that Ruffin was not a prevailing party because he obtained no damages and the injunctive relief was not directed at the specific incidents of discrimination to the plaintiff but at the black employees in general. The Court said in rejecting these arguments, *"that Ruffin only partially prevailed in his suit against Great Dane in no way precludes him from receiving*

attorney's fees. Indeed, the very import of *Garland* is that a plaintiff need only prevail on one significant issue to qualify as a prevailing party under 42 U.S.C. §1988." *Id.* at 993 (emphasis added). "The relief afforded Ruffin materially altered his relationship with Great Dane." *Id.* at 993, 994. In rejecting the employer's second argument the Court went on to say:

> the court used its injunctive powers *to address situations which had previously resulted in violation of the plaintiffs' rights, and to mandate the implementation of procedures that would ensure against the recurrence of such violations* . . . Where as here, injunctive relief is requested by a plaintiff and granted by the district court, *the accompanying failure of the court to provide retrospective relief in the form of compensatory damages does not negate the court's use of its authority* to mandate Great Dane's increased attention and improved responses to jobsite racism.

Ruffin, 969 F.2d at 994 (emphasis added).

The Court of Appeals modified the trial court's judgment, denied Petitioner her status as a prevailing party and vacated her award of attorney's fees and costs based on *Farrar v. Hobby,* 506 U.S. 103, 113 S.Ct. 566 (1992) (Court's opinion App. A-22). There, Farrar's estate sought $17 million for the illegal closure of a private school by officials of the State of Texas. *Id.* at 106, 570. Although Farrar prevailed on its conspiracy theory to close the school, the jury found no proximate cause of any damages. *Id.* at 106, 570. The Supreme Court went on to say that "denial of procedural due process" justifies nominal damages so the plaintiff is the prevailing party. *Id.* at 112, 573.

This case is not a procedural due process case standing alone and is distinguishable from *Farrar.* Petitioner asserted a state cause of action and a Title VII claim based on the same operative facts. She prevailed on both and got damages on one. She obtained more than a declaratory judgment, *one on which she can levy execution and seek sanctions if T² fails to return her medical records.*(emphasis added). She is not liable to T² for any of their claims against her. Recovery of attorney's fees with this mixture of success is appropriate. *Hall v. Western Production Company,* 988 F.2d 1050, 1055 (10th Cir. 1993); *Lund v. Affleck,* 587 F.2d 75 (1st Cir. 1978). In *Hall,* a former employee made a claim for age discrimination and breach of contract. The jury found in his favor on both issues but awarded damages on the contract claim only. *Id.* at 1055. The jury had been instructed that it could not award damages on both. *Id.* After distinguishing *Farrar,* the Court said that since Hall prevailed on his state cause of action, "he is entitled to attorney's fees as the prevailing party." *Id.* at 1057.

It is undisputed that a party who prevails on both state and federal claims is a prevailing party. *Heath v. Brown,* 807 F.2d 1229, 1233 (5th Cir. 1987). This includes one who prevails on a federal claim without damages and a state claim. *Williams v. Thomas,* 692 F.2d 1032, 1036 (5th Cir. 1982), *cert. den.,* 462 U.S. 1133, 103 S.Ct. 3115 (1983) ($2500 in attorney's fees is inadequate where plaintiff recovered $500 actual damages on his state claim). An appropriate fee should be awarded to Plaintiff's attorneys. *Id.* at 1039. And where the Plaintiff included a claim for invasion of privacy with her Title VII action, time spent on both can be included in an award of attorney's

fees. *Phillips v. Smalley Maintenance Services, Inc.*, 711 F.2d 1524, 1530 (11th Cir. 1983). Where several claims arise out of a common factual core or are based on related legal theories, separating out the legal services rendered with respect to these overlapping claims would be an exercise in futility. *Garritz v. Sununu*, 752 F.2d 727, 735 (1st Cir. 1984). Prevailing plaintiffs may be entitled to compensation for time expended on related claims. *Zabkowicz v. West Bend Company, Div. of Dart Industries, Inc.*, 789 F.2d 540, 551 (7th Cir. 1986). In addition, they should be awarded court costs. *Mennor v. Fort Hood National Bank*, 829 F.2d 553 (5th Cir. 1987). These cases are more analogous to the facts of Petitioner's case than *Farrar*.

The appellate court should not reverse an award of attorney's fees unless the trial court abused its discretion or based its award on clearly "erroneous findings of fact." *EEOC v. Clearlake Dodge*, 60 F.3d 1146, 1153 (5th Cir. 1995). The trial judge did not make any erroneous findings in connection with this case, and the finding of "prevailing party" was correct.

Petitioner has crossed that threshold and is entitled to some attorney's fees. Her legal relationship with T[2] has changed dramatically since the start of the trial. In Respondents' pleadings Petitioner was sued for fraud, promissory estoppel, and breach of contract plus attorneys' fees. Both compensatory and punitive damages were claimed. After the evidence was presented the jury found Petitioner to have no liability to her former employer. On the contrary she now has a trial court judgment declaring that she was illegally discriminated against due to her pregnancy, that she is the prevailing party, that she should get her medical tests back from her

employer which the Respondents illegally obtained, that the Respondents must enact policies which prohibit discrimination based on pregnancy which would include a prohibition from seizing medical tests of child bearing women and using them in any way to discriminate against those persons including Petitioner if she were an employee. It goes on to require other policies to be established addressing illegal pregnancy discrimination. This will affect all women of child bearing age working for T[2].

A reasonable fee would be based on the degree of success Petitioner obtained. Of the seven allegations contained in her Petition, shown on page A-20 & 21 of the Court of Appeals' opinion, she obtained relief on four (1, 3, 4 & 7). This may not justify recovery of the lodestar amount, but the trial court found $250,000 to be reasonable. If that is unreasonable following the vacation of part of the injunctive relief, then Petitioner is entitled to some attorney's fees to be decided on remand by the trial court.

III.

THE COURT OF APPEALS ERRED WHEN IT FAILED TO APPLY THE ABUSE OF DISCRETION STANDARD TO THE TRIAL JUDGE'S PERMANENT INJUNCTION IN DIRECT CONFLICT WITH THIS COURT'S DECISION OF *U.S. V. PARADISE*

Following a week of testimony the jury found that the Respondents had wrongfully discriminated against Petitioner because of her pregnancy. The trial judge made a finding of intentional discrimination and issued injunctive relief (App B-3). The Court of Appeals did not apply the correct standard of review and said that it should

balance the equities and examine the record for a history of discrimination or indications of future non-compliance with the law before issuing a permanent injunction (App. A-15). This error is significant because by applying the incorrect standard, the Court of Appeals has substituted its judgment for the trial judge's solemn opinion. The Court of Appeals is limited on appeal to whether the trial judge abused his discretion in issuing the injunctive relief. *U.S. v. Paradise*, 480 U.S. 149, 185, 107 S.Ct. 1053, 1074 (1987); *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1519 (9th Cir. 1989). "So long as the district court's decision to issue injunctive relief is not based on an incorrect interpretation of the law, it is reviewed for an abuse of discretion." *Bouman v. Block*, 940 F.2d at 1233.

And furthermore, the Court of Appeals erroneously concluded that there was no evidence that Respondents would discriminate in the future (App. A-15). This is mere opinion and speculation as to a matter already decided by the trial court.

An abuse of discretion warranting reversal occurs only when no reasonable person could adopt a view taken by the trial court. *Lynch v. City of Milwaukee*, 747 F.2d 423, 426 (7th Cir. 1984). There is no abuse of discretion if a reasonable person could only disagree as to the court's actions. *McKnight v. United States Steel Corp.*, 726 F.2d 333, 335 (7th Cir. 1984).

The Court of Appeals can differ with the trial judge as to the likelihood of further discrimination, but cannot say that there has been an abuse of discretion which is the standard to be applied. *Paradise*, 480 U.S. 185, 107 S.Ct. 1074.

T² went to extraordinary lengths to deny any wrong doing because they knew this conduct was illegal and could be costly. The trial judge, who was familiar with the file and viewed this swearing match in person, is in the best position to fashion appropriate relief. Where the Defendant failed to present evidence that it put aside illegal activities and instead continued to "deny the existence of racial hostility," injunctive relief was appropriate. *EEOC v. Beverage Canners, Inc.*, 897 F.2d 1067, 1072 (11th Cir. 1990). This scenario could happen again now that the injunction has been dissolved.

The Court's citing of Christine Burns as an example of further employment of a pregnant woman is not an indication of the company's future conduct. She was the principal owner and primary decision maker at Extendacare and the one who broke the code and obtained Petitioner's confidential medical record. Burns was part of the problem, not a representative of middle management like Petitioner. This offers little comfort to women of childbearing years employed by T².

The trial court did what was appropriate and necessary following the jury verdict, the testimony of the witnesses, and the lack of creditability of some of the T²'s witnesses, with a finding of intentional discrimination by the Respondents. The fact that he decided a matter within his discretionary authority different than an appellate judge might decide under the same circumstances does not establish an abuse of discretion. There was no abuse of discretion based on all of the facts and testimony in the record. It was the most appropriate remedy and the Court of Appeals erred in analyzing factual matters where there was a legal basis for the trial court's action.

CONCLUSION

Petitioner recovered on her discrimination claim and one of her state claims. The trial court awarded her a valid and enforceable judgment against Respondents which included injunctive relief. No other proof of past discrimination or the probability of future discrimination is required by the statute. 42 U.S.C.A. §2000e-5(g) (App. D-1). Petitioner was successful on the significant issue in this litigation and achieved some of the benefit in bringing suit. The Court of Appeals erred when it found that Petitioner was not the prevailing party and vacated the award of attorney's fees. She is entitled to some attorney's fees and her costs.

The Court of Appeals applied the incorrect standard of review in dissolving the injunction against Respondents. The test is whether the trial judge abused his discretion in issuing the injunctive relief against sexual discriminatory practices. That the Court of Appeals has a difference of opinion does not permit vacating the injunction. They are in direct conflict with earlier cases on this point, and the injunction should be reinstated.

Respectfully submitted,

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APPENDIX A

AFFIRMED AS MODIFIED, Opinion Filed December 16, 1996

(SEAL)

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-95-00601-CV

EXTENDACARE HEALTH SYSTEMS, INC. AND T2 MEDICAL, INC., Appellants

V.

GLORIA GISCH, Appellee

On Appeal from the 101st Judicial District Court
Dallas County, Texas
Trial Court Cause No. 92-5861-E

OPINION

Before Justices Morris, James, and Wolfe
Opinion By Justice James

Appellants, Extendacare Health Systems, Inc. (Extendacare) and T2 Medical, Inc., (T2) appeal from a jury verdict in favor of appellee, Gloria Gisch. The jury found that Extendacare and T2 discriminated against Gisch on the basis of her pregnancy and violated her right to privacy. Based on the jury's findings, the trial court granted appellee's request for injunctive relief.

Because the trial court determined appellee was a prevailing party under both Title VII and the Texas Commission on Human Rights Act (TCHRA), the court awarded her attorneys' fees in the amount of $250,000 and costs in the amount of $42,582.75.

Appellants bring six points of error that can be summarized as follows: The trial court erred in granting injunctive relief, in awarding attorneys' fees, in failing to condition appellate attorneys' fees upon success at each level, and in awarding excessive costs. The first issue we address is whether the trial court erred in ordering injunctive relief. Without regard to whether the trial court erred in granting injunctive relief, we will also examine whether appellee is a prevailing party.

I. Procedural and Factual Background

Appellee began working for Extendacare in 1987 as a pharmacist. Over the next few years, she began performing additional duties such as inventory control, overseeing other pharmacists, overseeing the nursing department, and completing the payroll. In 1989, Christine Burns, the owner of Extendacare, officially changed appellee's title to operations manager. In addition, Burns offered appellee the option of buying ten percent of the company. Appellee accepted the offer and paid approximately $8,000 for this ten percent interest.

In the latter part of 1990, Burns began negotiations with T2 to sell Extendacare. Burns testified that during the negotiations between Extendacare and T2, she assured T2's representatives that they could depend on

appellee. Burns also told them appellee was more instrumental in the running of Extendacare than she was. Because of the additional duties Burns had given appellee over the years, appellee was capable of running the company.

Appellee had been feeling ill for many months and she decided to send her blood samples to the in-house for testing on November 20, 1990. One of the tests appellee requested was a pregnancy test. Appellee received the pregnancy test the same day and it indicated a positive result. Appellee asked the nurse who had helped her draw blood, Cathy Denning, to keep the results confidential.

T2 closed the purchase of Extendacare on November 30, 1990. Burns testified that T2 would not have bought Extendacare if appellee had not agreed to sign a two-year employment contract. Accordingly, Appellee agreed to a two-year employment contract. T2 also contracted to pay appellee $75,000 per year with benefits, as well as instituting a payment plan to compensate appellee $1.5 million for her ten percent share in Extendacare. Appellee, however, was dissatisfied with the $1.5 million because she thought she should have received thirty percent instead of ten percent for her interest.

On December 1, 1990, appellee told Burns about her pregnancy. Although it is unclear when appellee told Kolander, T2's district manager over marketing, of appellee's pregnancy, he knew by the 4th. On December 5th, appellee felt too ill to go to work and called Burns to

inform her about the medical problems she was experiencing. Burns told her not to worry about work and to take care of herself.

That same day, appellee went to see Doctor Mayra Thompson concerning her pregnancy. The doctor's office performed a sonogram that confirmed her pregnancy. According to appellee, the nurse told her that the doctor ordered bed rest, limited activity, no stress, and no work. Appellee testified she told both Burns and Kolander about her doctor's visit and the doctor's orders.

On January 3, 1991, Doctor Thompson performed another sonogram and found a partially detached placenta. Appellee testified that the doctor told her to continue bed rest and limit her activity. Appellee testified she told Kolander about this doctor's visit and the doctor's orders.

While appellee remained at home, T2's board of directors conducted a meeting to discuss her extended absence from work. Appellee had not been to work since December 5th. The board purportedly discussed options such as appellee returning full-time, returning part-time, or tendering her resignation.

According to the record, appellee's husband, Gary Gisch, called Kolander either January 5th or January 7th. Gisch expressed concern about his wife's condition and whether she should be working. Kolander testified that he understood Gisch to be saying appellee should not be working. From this conversation, Kolander believed appellee wanted to resign.

Burns testified that although she knew appellee was feeling sick from the pregnancy, she did not know until early January that the doctor had ordered appellee to stay home. Burns testified she wanted appellee to return to work because she was ready to quit working due to her own pregnancy. Burns became angry when Kolander told her appellee was resigning because appellee's resignation meant she would have to continue performing appellee's duties.

On January 7, 1991, Kolander called appellee about an offer from T2. Kolander did not disclose the nature of the offer at this time. Instead, he set up a meeting to discuss the offer with appellee on January 10th. After speaking with Kolander, appellee requested a short-term disability form. On January 8th, appellee called her doctor's office for medical documentation to verify her absence from work.

On January 10th, appellee and her husband met with Kolander. According to appellee, Kolander terminated her and refused to accept medical documentation they offered to verify her absence from December 5th to January 10th. Kolander testified, however, that he asked appellee for medical documentation and although appellee said she had the documentation, she never offered it to him. Kolander also testified that at the time of the meeting, he didn't know about appellee's visits to the doctor or that the doctor had ordered her to stay home. Kolander knew only that appellee was pregnant and at home because she was sick.

After meeting with Kolander, appellee contacted Jeff Muir, general counsel for T2, and told him about her

meeting with Kolander. Muir said T2 had not intended to fire her and she was not fired. T2 thought she wanted to resign. If she wasn't resigning, however, T2 needed to know her medical status. Appellee informed him about the detached placenta. Muir indicated this conversation was the first time he knew about appellee's problems with her pregnancy. Pursuant to Muir's conversation with appellee, T2 sent appellee a letter on January 11th indicating it wanted appellee to continue working for them. Appellee continued receiving her salary and benefits.

Cathy Denning, the nurse who had helped appellee run the medical tests, testified she had heard conversations between Kolander and Burns prior to January 11th that appellee would not be returning to work. Denning testified that on the 11th, Burns requested appellee's medical records, including appellee's pregnancy test. Also on the 11th, Kolander promoted Denning to center manager. This position included many of the same duties previously performed by appellee.

On January 17th, appellee and her husband went to T2 to pick up her belongings. Appellee testified that several items were missing from her desk. According to Denning, Burns and Laura Kalesnik had gone through appellee's desk and thrown some files into a bag. Burns said she removed documents from appellee's desk when she needed them to perform appellee's duties.

On January 18th, Dr. Thompson partially removed the restrictions. Appellee could return to limited activity, but not work. On February 5th, the Dr. Thompson completely removed appellee's restrictions.

On February 11, 1991, T2 sent appellee a letter demanding she either return to work on February 13th or give them medical documentation explaining why she had been off work since December 5th. If she failed to return to work or provide the documentation, T2 would terminate her employment. Appellee did not return to work or provide medical information and appellants considered her terminated as of the 13th.

With this testimony in mind, we will examine whether the trial court properly ordered injunctive relief.

II. Injunctive Relief

Based on the jury's finding of discrimination, the court granted appellee's request for injunctive relief and ordered appellants to "institute and carry out policies and practices to eradicate the effects of its past and present unlawful employment practices." In their first point of error, Appellants' contend the trial court erred in overruling appellants' objections to the injunctive relief appellee sought. Specifically, appellants contend the case law does not allow the trial court to issue an injunction absent evidence of past discrimination, pervasive discrimination, or discrimination likely to occur in the future. Moreover, appellants argue injunctive relief should be denied because appellee does not work for them, did not seek reinstatement, and therefore does not benefit from the injunction.

Appellee argues, however, that the case law mandates injunctive relief when there is a finding of discrimination. Appellee asserts that the cases state that

injunctive relief is proper to eradicate the effects of discrimination upon anyone in her classification. Moreover, appellee contends that the employer's absence of a history of discrimination or current cessation of discriminatory conduct is not an absolute to the court's granting or denying injunctive relief.

a. Injunctive Relief under the TCHRA and Title VII

Appellee complained of appellants' employment practices under both the TCHRA and Title VII of the Civil Rights Act of 1964 (Title VII). Both acts provide for injunctive relief. Specifically, Section 21.258 of the Labor Code (the codification of the TCHRA) states that "[o]n a finding that a respondent engaged in an unlawful employment practice as alleged in a complaint, a court may:

> "(1) prohibit by injunction the respondent from engaging in an unlawful employment practice; and
>
> (2) order additional equitable relief as may be appropriate."[1]

Because the TCHRA's goal is to promote federal civil rights and because Texas has little case law interpreting

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[1] Act of June 25, 1983, 68th Leg., 1st C.S., ch. 7, § 7.01, 1983 Tex. Gen. Laws 37, 52-55, *amended by* Act of May 29, 1989, 71st Leg., R.S., ch. 1186, § 19, 1989 Tex. Gen Laws 4824, 4831-32, *amended by* Act of May 12, 1993, 73rd Leg., R.S., ch. 269, § 1, 1993 Tex. Gen. Laws 987, 1003 (current version at TEX LABOR CODE ANN. § 21.258 (Vernon 1996)).

the TCHRA, we will examine analogous federal precedent to determine whether injunctive relief is appropriate under the facts of this case. *See Holt v. Lone Star Gas Co.*, 921 S.W.2d 301, 304 (Tex. App. – Fort Worth 1996, no writ); *City of Austin v. Gifford*, 824 S.W.2d 735, 739 (Tex. App. – Austin 1992, no writ).

Appellants cite many cases indicating injunctive relief is discretionary and dependent upon several factors. Appellee cites many cases indicating injunctive relief is mandatory once there is a finding of discrimination. First, we will examine the cases in which the courts hold injunctive relief is mandatory and then we will examine the cases in which the courts hold injunctive relief is discretionary.

Appellee cites *James v. Stockham Valves & Fitting Co.*, 559 F.2d 310 (5th Cir. 1977), to illustrate the mandatory nature of injunctive relief when there is a finding that the employer discriminated against the employee on an unlawful basis. The employees in *James* were African-Americans who instituted a class action to sue their employer for maintaining racially segregated facilities; discriminating against black employees in job assignments, promotions, training, and transfers; and employing discriminatory testing, education, and age requirements. *Id.* at 313. The district court found that except for the segregated facilities, the employer had not engaged in employment discrimination. *Id.* at 314. The Fifth Circuit examined the employer's various policies, practices, and statistical evidence and found evidence of other discriminatory practices. *See id.* at 315-352.

The Fifth Circuit also reevaluated the district court's failure to order injunctive relief because the employer had discriminated by segregating facilities. *See id.* at 354. The district court had refused to give the employees injunctive relief because the situation had been resolved. *Id.* The Fifth Circuit, however, found that the employer presently adopted discriminatory policies and practices by segregating the facilities. *Id.* The court stated that "absent clear and convincing proof of no reasonable probability of further noncompliance with the law a grant of injunctive relief is mandatory." *Id.* The court urged the district court to reassess the evidence. *Id.* at 355. Unless the district court could discern clear and convincing evidence that there was no reasonable probability of further noncompliance, it should enter a broad injunction against all the employer's facilities and programs. *Id.*

The Fourth Circuit has stated also that "when a plaintiff has prevailed and established the defendant's liability under Title VII, there is no discretion to deny injunctive relief completely." *Gregory v. Williams*, 871 F.2d 1239, 1246 (4th Cir. 1989). This case involved the sheriff's practice of refusing to consider women for deputy sheriff positions. *Id.* at 1240. The court explained that Title VII did not limit injunctive relief to ongoing discriminatory policies. *Id.* at 1246. District courts have power to grant injunctive relief after discontinuance of discriminatory practices, especially if the record fails to demonstrate a "total cessation of the unlawful practices." *Id.* The record in *Gregory* revealed that the sheriff's successor continued the discriminatory practice.

These two cases approve a mandatory injunction when the employer institutes discriminatory policies and

practices. Not only had the employer instituted discriminatory policies and practices, in both cases the record revealed that the employer continue to adhere to discriminatory policies and would probably continue to do so absent an injunctive order. Therefore, injunctive relief was mandatory to correct the discriminatory conduct.

On the other hand, the cases appellants cite stress the trial court's discretionary function in fashioning injunctive relief. The next line of cases focuses on whether the injunctive relief will benefit the plaintiff who filed suit against the employer and whether the employer continues to institute discriminatory practices.

In 1971, the Seventh Circuit explained the role of injunctive relief under Title VII in *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir. 1971). The employee sued her employer for discrimination based on her sex. *Id.* at 1196. Specifically, the employer terminated the employee after she married because it had a policy of requiring female stewardesses or attendants to remain unmarried. *Id.* The employer did not, however, have the same policy concerning male attendants. *Id.* The district court ordered the employer to refrain from discriminating against the employee based on her sex, reinstate her, and pay her compensation from the date it illegally discharged her. *Id.* at 1197. The employee submitted suggestions that the scope of the injunctive relief be broadened to include other stewardesses wrongfully discharged. *Id.* An interlocutory appeal ensued. *Id.*

The appellate court stressed Title VII's remedial purpose. *See id.* at 1201. Although the lawsuit was not necessarily a class action, Title VII's purpose was to end

discrimination based on class characteristics. *Id.* Because the discrimination was based on class characteristics, the interests of other members were at stake and the trial court should have fashioned a remedy to effectuate the purpose of Title VII, as well as affording private relief to the actual plaintiff. *Id.* Therefore, Title VII gave the trial court the power to eradicate present discrimination and redress adverse consequences of past unlawful conduct. *Id.* at 1202. Injunctive relief should terminate the practice and make the victims whole. *Id.* To make the victims whole, injunctive relief should be available to all those who were damaged, whether or not they joined the lawsuit. *Id. Sprogis* stresses the trial court's evaluation of present discriminatory practices, as well as a determination of the victims of the unlawful discrimination. All victims should be afforded relief.

The court in *Gregory v. Litton Systems, Inc.*, 472 F.2d 631 (9th Cir. 1972), explained how injunctive relief may affect nonparties. The employee sued his employer for race discrimination based on the employer's use of a questionnaire requiring the applicant to reveal his arrest record. *Id.* at 632. The trial court found this practice to be in violation of Title VII. *Id.* The employee did not seek reinstatement and as a result of a stipulation, was to receive a money judgment. *Id.* at 633. Therefore, injunctive relief was unnecessary to make the employee whole. *Id.* Any injunctive relief would benefit only persons not before the court. *Id.* Because there was no evidence the employer had a history of discrimination or an intent to discriminate, the court concluded an injunction was unnecessary to benefit persons not before the court. *Id.*

The court stressed that injunctive relief benefitting nonparties may be proper if necessary to give a plaintiff or a group of plaintiffs the relief to which they are entitled. *Id.* Injunctive relief may necessarily benefit those persons not before the court. *Id.* at 634. The employee, however, was not seeking prospective relief for himself and no one sought a broad injunction. *Id.* Therefore, injunctive relief was not necessary to the resolution of the litigation. *Id.*

Finally, the employee in *Meyer v. Brown & Root Constr. Co.*, 661 F.2d 369, 371 (5th Cir. 1981) sued her employer for discharging her because of her sex. Specifically, the employee alleged her employer constructively discharged her because she was pregnant. *Id.* The district court enjoined the corporation from "engaging in the stated unlawful employment practice." *Id.* at 373. The employer argued that because the injunction could enjoin discrimination against other individuals, it was impermissibly broad. *Id.* The court said the purpose of Title VII is to eliminate discrimination and grant relief to those who have suffered from it. *Id.* The court also stressed, however, that even if an employer has intentionally discriminated, injunctive relief is not necessarily mandatory. *Id.* at 373-74. The trial court must balance the equities and fashion relief consistently with Title VII's goals. *Id.* The district court erred in granting injunctive relief because the employee did not seek prospective relief in this case. *Id.* Although injunctive relief may benefit nonparties, injunctive relief was not necessary under these facts for a just disposition of the case. *Id.*

After reviewing these cases, a common thread concerning injunctive relief begins to evolve. If there is evidence of past discrimination and the record reveals the

probability of future discriminatory practices, the trial court must fashion injunctive relief for the benefit of anyone victimized by the discriminatory practice. *See James*, 559 F.2d at 354-55; *Gregory v. Williams*, 871 F.2d at 1246. If there is no evidence of future noncompliance with the law, however, injunctive relief may not be necessary to make the plaintiff whole or benefit incidental nonparties. *Gregory v. Litton Systems, Inc.*, 472 F.2d. at 632-633. If the plaintiff has not requested any prospective relief such as reinstatement, injunctive relief may not be necessary to make the victim whole. *Meyer*, 661 F.2d at 373-74. For nonparties to benefit from injunctive relief, the injunction should benefit the plaintiff, address past discriminatory practices, or address probable future noncompliance with the law. *Id.*

In this case, appellee sued appellants for wrongful termination based on her sex. Specifically, appellee alleged appellants terminated her because she was pregnant. The jury found that appellants discriminated against appellee on the basis of her pregnancy. We respect the jury's verdict. This determination, however, does not necessarily entitle appellee to injunctive relief. We must balance the equities and examine the record for a history of discriminatory practices, indications of future noncompliance with the law, or the need to fashion relief to make appellee whole.

Although the jury found that appellants discriminated against appellee, they did not award her any damages. At some point during the trial, appellee abandoned any request for reinstatement. At this time, appellee does not work for appellants and has no desire to do so. Under the facts of this case, only nonparties will benefit from the

trial court's injunction. The nonparties, however, will benefit from the injunction only if the appellants have a policy or practice of terminating pregnant women.

There is no evidence in the record to suggest appellants discriminated against pregnant women in the past. There is no evidence in the record to suggest appellants will discriminate against pregnant women in the future. In fact, during the month of December, Burns continued working for appellants while she was eight months pregnant. Her continued employment indicates appellants did not have a policy of terminating pregnant women. Under these facts, there is not a danger of a continuing violation. Therefore, injunctive relief is not necessary to the fair resolution of this conflict.

Accordingly, we sustain appellants' first point of error concerning the trial court's award of injunctive relief under the TCHRA and Title VII. Appellants' second point of error complaining that the injunction was overly broad is moot because of our conclusion that injunctive relief is improper under the facts of this case.

b. Injunctive Relief under Invasion of Privacy

Upon appellee's request and the jury's finding that appellants had invaded her privacy, the trial court ordered appellants to return appellee's medical records to her. In appellants' first point of error, they also complain that the trial court erred in ordering them to return the medical records. Appellants argue the trial court should not have issued such an order because the invasion of privacy claim was not connected to any discriminatory conduct. We briefly address this order.

The jury found that appellants had invaded appellee's privacy and awarded her $9,530 therefor. The trial court ordered appellants to return to appellee the original and all copies of her pregnancy tests printed on January 11, 1991 within ten days of the judgment being signed. According to appellee, appellants have failed to return these tests.

The remedy for an invasion of privacy cause of action may be either injunctive, compensatory, or both. *See Kramer v. Downey*, 680 S.W.2d 524, 526 (Tex. App. – Dallas 1984, writ ref'd n.r.e.). An order granting an injunction "shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail . . . the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys." Tex. R. Civ. P. 683; *See Thompson v. Thompson Air Conditioning and Heating, Inc.*, 884 S.W.2d 555, 559 (Tex. App. – Texarkana 1994, no writ). The injunction should be capable of reasonable construction, as well as good faith obedience. *Thompson*, 884 S.W.2d at 559.

Appellee's invasion of privacy cause of action was based primarily on Burns' obtaining appellee's medical records and appellants' refusal to return them to her. The trial court's order for the return of appellee's medical records was clear and unambiguous. Moreover, the action ordered by the trial court was within appellants' power. Thus, we overrule appellants' first point of error concerning the trial court's injunctive order that appellants return appellee's medical records.

II. Prevailing Party

In appellants' third point of error, they contend the trial court erred in awarding appellee attorneys' fees because she was not entitled to them. Specifically, appellants argue that appellee fails the threshold test for an award of attorney fees because she is not a prevailing party under either the TCHRA or Title VII. Appellants primarily base their argument that appellee is not a prevailing party on a comparison of the relief appellee sought to the relief appellee obtained at trial, as well as the Supreme Court's decision in *Farrar v. Hobby*, 113 S.Ct. 566, 573-75 (1992).

In appellee's last live pleading, she alleged sex discrimination under both Title VII and the TCHRA, invasion of privacy, breach of contract, and breach of the duty of good faith and fair dealing. The trial court granted appellants' motion for summary judgment on appellee's claim of breach of the duty of good faith and fair dealing. The jury found against appellee on her claim of breach of contract. As mentioned previously, the jury found that appellants discriminated against appellee on the basis of her sex. The jury also found that appellants invaded her privacy and awarded her $9,350 therefore.

Like Title VII, the TCHRA allows the trial court to award reasonable attorney fees to the prevailing party.[2]

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[2] Act of June 25, 1983, 68th Leg., 1st C.S., ch. 7, § 7.01, 1983 Tex. Gen. Laws 37, 52-55, *amended by* Act of May 12, 1993, 73rd Leg., R.S., ch. 269, § 1, 1993 Tex. Gen Laws 987, 1003, *amended by* Act of April 21, 1995, 74th Leg., R.S., ch. 76, § 9.07, 1995 Tex. Gen. Laws 458, 626 (current version at Tex Labor Code Ann. § 21.259 (Vernon 1996)).

As in our examination of whether injunctive relief was necessary, we again consider how federal courts have implemented the federal act to aid us in construing the Texas act. *See Caballero v. Central Power and Light Co.*, 858 S.W.2d 359, 361 (Tex. 1993).

In *Farrar*, the Supreme Court considered whether a plaintiff receiving only nominal damages was a prevailing party under section 1988. *See Farrar*, 113 S.Ct. at 573-75. The Court said a civil rights plaintiff must succeed on some of the merits of his or her claim. *Id.* at 573. The plaintiff must secure some relief that directly benefits him or her at the time of the judgment. *Id.* There must be a direct benefit because the judgment should affect the behavior of the defendant toward the plaintiff. *Id.* Therefore, a plaintiff prevails "when actual relief on the merits of [her] claim materially alters the relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Id.*

In *Farrar*, the jury found that Hobby had acted under the color of state law to deprive Farrar of a civil right. *See id.* at 570. The jury also found, however, that Hobby's conduct was not a proximate cause of Farrar's damages. *See id.* The district court ordered that Farrar take nothing. *See id.* The Fifth Circuit, however, remanded for the entry of a judgment against Hobby for nominal damages. *See id.* The district court then awarded nominal damages, as well as attorney's fees. *See id.*

The Supreme Court concluded that nominal damages must be awarded when there has been a violation of procedural due process. *See id.* at 573. The Court then

held that a plaintiff winning nominal damages is a prevailing party under section 1988. *Id.* A judicial declaration that a defendant has violated the Constitution, however, without an enforceable judgment on the merits, does not maker [sic] a plaintiff a prevailing party. *Id.* By itself, any moral satisfaction derived from a favorable statement that a defendant has violated the law cannot bestow prevailing party status. *See id.* at 573-74.

Appellee argues that *Farrar* is not applicable because it pertains to an award of attorney's fees under section 1988. District courts, however, have used *Farrar* to determine whether the plaintiff is a prevailing party and whether an award of attorney's fees is reasonable under Title VII. *See Sheppard v. Riverview Nursing Ctr., Inc.*, 88 F.3d 1332, 1335-36 (4th Cir. 1996); *Griffith v. State of Colo., Div. of Youth Servs.*, 17 F.3d 1323, 1328 (10th Cir. 1994).

Moreover, appellee argues her case differs from *Farrar* in that she sought much more than mere money damages. Although she did not recover any monetary relief on her Title VII claim, appellee contends she prevailed because she obtained a judgment declaring that appellants discriminated against her, an injunction against appellants for her discrimination claim, a judgment declaring that appellants invaded her right to privacy, and a money judgment for her invasion of privacy claim.

First, we separate the discrimination claim from the right to privacy claim. Section 21.259 of the Texas Labor Code states that "[i]n a proceeding under this chapter

[the TCHRA], a court may allow the prevailing party . . . a reasonable attorney's fee as part of the costs."[3] There is no case law suggesting that merely because a plaintiff has joined several different causes of action in one lawsuit that happens to include a discrimination claim, attorney's fees will be recoverable for all claims so joined. Therefore, we compare the relief appellant requested to the relief she received pertaining solely to her discrimination claim.

Concerning her discrimination claim, appellee asked for:

> 1) a permanent injunction restraining appellant from engaging in any employment practice which discriminates against her because of her sex and/or pregnancy, or which retaliates against her for pursuing her right under Title VII or the TCHRA;
>
> 2) a permanent injunction ordering appellants to reinstate her to her former position at Extendacare, with full seniority and salary, together with appropriate seniority and salary increments;
>
> 3) a declaratory judgment that appellants' acts, practices, and/or policies complained of violated the TCHRA;

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[3] Act of June 25, 1983, 68th Leg., 1st C.S., ch. 7, § 7.01, 1983 Tex. Gen. Laws 37, 52-55, *amended by* Act of May 12, 1993, 73rd Leg., R.S., ch. 269, § 1, 1993 Tex. Gen Laws 987, 1003, *amended by* Act of April 21, 1995, 74th Leg., R.S., ch. 76, § 9.07, 1995 Tex. Gen. Laws 458, 626 (current version at TEX LABOR CODE ANN. § 21.259 (Vernon 1996)).

4) an order that appellants institute and carry out policies and practices to eradicate the effects of its past and present unlawful employment practices;

5) a money judgment awarding her actual damages for her lost wages, benefits, emotional distress, inconvenience, loss of the enjoyment of life, in the past and future, punitive, and other compensatory damages, together with prejudgment and post-judgment interest thereon because of appellants' violation of the TCHRA, Title VII, and the Civil Rights Act of 1991;

6) an award of costs in pursuing her cause of action, as well as reasonable attorney's fees; and

7) an order dismissing appellants' claims with prejudice and to impose appropriate sanctions upon appellants and/or their counsel.[4]

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[4] We note that in 1992, when this cause of action arose, the TCHRA did not provide for compensatory or punitive damages. *See* Act of June 25, 1983, 68th Leg., 1st C.S., ch. 7, § 7.01, 1983 Tex. Gen Laws 37, 52-55 (the legislature codified the TCHRA and, as previously, did not include any provision that allowed recovery for compensatory or punitive damages). The legislature added a provision for compensatory and punitive damages in 1993. *See* Act of May 14, 1993, 73rd Leg., R.S., ch. 276, § 7, 1993 Tex. Gen. Laws 1285, 1291, *amended by* Act of April 21, 1995, 74th Leg., R.S. ch. 76, § 9.07, 1995 Tex. Gen. Laws 458, 625-26 (current version at TEX. LAB. CODE ANN. § 21.258 (Vernon 1996)). Appellants failed, however, to object to appellee's inclusion of relief consisting of both compensatory and punitive damages. As such, appellant waived any error. *See* TEX. R. APP. P. 52. We, therefore, compare the relief appellee sought to the relief appellee received without regard to whether she could have obtained such relief under the controlling version of the TCHRA at the time her cause of action arose.

During closing argument, appellee sought several million dollars in compensatory and punitive damages. In addition, appellee focused on the second question in the jury's charge concerning the sum of money that would fairly and reasonably compensate her. After appellants' closing argument, appellee again reiterated the damages the jury should award under question two. These damages included front pay, back pay, benefits, stock options, future wages, pain and suffering, and punitive damages. The jury awarded appellee no damages under question two.

Of the seven allegations for relief in her petition, appellee obtained only a judgment declaring that appellants discriminated against her and a general injunction for appellants to institute polices and practices to eradicate past and future discriminatory employment practices. The trial court did not order specific injunctive relief requested in appellee's petition. As we have concluded, injunctive relief was inappropriate in this case in the absence of evidence to substantiate a practice of discrimination or evidence that appellants would continue any discriminatory practices in the future. Therefore, appellee's sole recovery under her discrimination claim was a judgment declaring that appellants discriminated against her. We fail to see how such a moral victory for appellee, without any monetary or equitable relief, can bestow prevailing party status. *See Farrar,* 113 S.Ct. 573-574.

Accordingly, we sustain appellants' third point of error, as well as points of error four through six, and vacate the award of costs and attorneys' fees.

IV. Appellee's Cross-Point

Appellee brings forth two points of error complaining that the trial court erred in granting appellants' motion for summary judgment on her retaliation claim. Because appellee failed to timely file a cost bond, we do not have jurisdiction to address this issue. *See Agricultural Warehouse, Inc. v. Uvalle,* 759 S.W.2d 691, 695 (Tex. App. – Dallas 1988), *writ denied per curiam,* 779 S.W.2d (Tex. 1989); *Chapman Air Conditioning, Inc. v. Franks,* 732 S.W.2d 737, 742-43 (Tex. App. – Dallas 1987, no writ); *Miller v. Spencer,* 732 S.W.2d 758, 761 (Tex. App. – Dallas 1987, no writ); *SVM Investments v. Mexican Exports, Inc.,* 685 S.W.2d 424, 430 (Tex. App. – San Antonio 1985, no writ); *Damron v. C. R. Anthony Co.,* 586 S.W.2d 907, 911-12 (Tex. Civ. App. – Amarillo 1979, no writ).

For the reasons set forth above, we affirm the trial court's judgment as modified.

/s/ Tom James
TOM JAMES
JUSTICE

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TEX. R. APP. P. 90

(Seal)

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

EXTENDACARE HEALTH SYSTEMS, INC. and T2 MEDICAL, INC., Appellants No. 05-95-00601-CV V. GLORIA GISCH, Appellee	Appeal from the 101st Judicial District Court of Dallas County, Texas. (Tr.Ct.No. 92-5861-E). Opinion delivered by Justice James,, Justices Morris and Wolfe participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **MODIFIED** as follows:

It is **ORDERED** that the injunctive relief ordering appellants to "institute and carry out policies and practices to eradicate the effects of its past and present unlawful employment practices" be vacated. It is further **ORDERED** that the award of attorneys' fees and costs be vacated.

As modified, the judgment of the trial court is **AFFIRMED**. It is **ORDERED** that appellee Gloria Gisch recover her costs of this appeal from appellant Extendacare Health Systems, Inc. and T2 Medical, Inc. and from Insurance Company of North America as surety on appellant's cost bond.

Judgment entered December 16, 1996.

/s/ Tom James
TOM JAMES
JUSTICE

APPENDIX B

NO. 92-5861

GLORIA GISCH, Plaintiff,	§	IN THE DISTRICT COURT OF DALLAS COUNTY, TEXAS
v.	§	101ST JUDICIAL DISTRICT
EXTENDACARE HEALTH SYSTEMS, INC. and T2 MEDICAL INC., Defendants.	§	

FINAL JUDGMENT

On October 3, 1994, this case was called to trial and the Plaintiff, Gloria Gisch, appeared in person and by and through her attorneys of record and the Defendants, T2 Medical, Inc. and Extendacare Health Systems, Inc. appeared by and through their attorneys of record and all parties announced ready for trial. A jury of twelve (12) persons was then duly accepted and paneled and sworn.

Both parties had a full opportunity to present evidence and to cross-examine the other parties' witnesses. After both parties closed, the Court prepared the charge and submitted it to the jury. Prior to submission the jury, the parties stipulated that any issues regarding attorneys' fees would be resolved by the Court through evidence presented by affidavit or live testimony of witnesses properly identified in response to interrogatories. After argument of counsel, the jury deliberated and returned its verdict to the Court. The verdict is incorporated in this judgment by reference.

The jury answered Question No. 1 as follows:

Question No. 1:

Do you find from a preponderance of the evidence that either of the Defendants discriminated against Gloria Gisch on the basis of her pregnancy?

Answer "YES" or "NO."

Answer: *Yes.*

The jury answered Question No. 2 as follows:

Question No. 2:

What sum of money do you find from a preponderance of the evidence would fairly and reasonably compensate Gisch for Defendants' discrimination against her from the date of termination to this date?

Answer in dollars and cents for each element.

a)	Lost wages:	$0.00
b)	Lost benefits:	$0.00
c)	Lost stock options:	$0.00
d)	Lost earnings, if any, which you find in reasonable probability, Gisch will suffer in the future:	$0.00
e)	Lost benefits, if any which you find in reasonable probability Gisch will suffer in the future:	$0.00

It is the opinion of the Court that based on the verdict of the jury that Defendants' acts, practices, and/

or policies applied to the Plaintiff constituted illegal pregnancy discrimination in violation of the Texas Commission on Human Rights Act and Title VII of the Civil Rights Act of 1964. The Court further orders that Defendants institute and carry out policies and practices which will eradicate the effects of its past and present unlawful employment practices. The Court further orders Defendants to return the original and all copies of Ms. Gisch's pregnancy tests printed on January 11, 1991, to her within ten (10) days after this judgment is signed. The Court further finds that Plaintiff Gloria Gisch is a prevailing party as defined by Title VII of the Civil Rights Act of 1964 and the Texas Commission on Human Rights Act and is entitled to attorney's fees in the amount of $526,108.36 to be paid by Defendants jointly and severally.

The jury answered Question No. 3 as follows:

Question No. 3:

Do you find by a preponderance of the evidence that Extendacare Health System, Inc. and E. Medical, Inc. breached their Employment Agreement with Gloria Gisch?

Answer "YES" or "NO."

Answer: *No.*

It is the opinion of the Court that based on the verdict of the jury that Plaintiff should take nothing on her claim of breach of contract. It is ORDERED that this claim is dismissed with prejudice.

The jury answered Question No. 6 as follows:

Question No. 6:

Do you find by a preponderance of the evidence that any of the acts of the agents or employees of Defendants, Extendacare Health Systems, Inc. or T2 Medical, were an invasion of Gisch's privacy?

Answer "YES" or "NO."

Answer: *Yes.*

The jury answered Question No. 7 as follows:

Question No. 7:

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate Gloria Gisch for her damages, if any, resulting from the conduct of Defendants with regard to invasion of Plaintiff's privacy?

Answer in dollars and cents, if any, that were sustained in the past and that in reasonable probability be sustained in the future.

Answer: *$9,530.00.*

The jury answered Question No. 8 as follows:

Question No. 8:

Do you find from a preponderance of the evidence that the Defendants acted with malice in invading Plaintiff's privacy?

Answer "YES" or "NO."

Answer: *Yes.*

The jury answered Question No. 9 as follows:

Question No. 9:

What sum of money, if any, do you find from a preponderance of the evidence should be assessed against Defendants, for their conduct, and awarded to Plaintiff, as exemplary damages?

Answer in Dollars and Cents:

Answer: *$0.00.*

It is the opinion of the Court that based on the verdict of the jury Defendants maliciously invaded Plaintiff's privacy and that Plaintiff is entitled to recover from Defendants, joint and severally, $9,530.00.

The jury answered Question No. 10 as follows:

Question No. 10:

Do you find from a preponderance of the evidence that Plaintiff breached the terms of her employment agreement with Defendants?

Answer "YES" or "NO."

Answer: *Yes.*

The jury answered Question No. 11 as follows:

Question No. 11:

What sum of money, if paid now in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate Defendants for monies paid under the Employment Agreement to which Plaintiff was not entitled?

Answer in Dollars and Cents:

Answer: *$0.00.*

The jury answered Question No. 12 as follows:

Question No. 12:

Do you find from a preponderance of the evidence that Plaintiff fraudulently induced the Defendants to enter into a contract with her?

Answer "YES" or "NO."

Answer: *No.*

It is the opinion of the Court based on the jury's verdict, that Defendants should take nothing based on their claims of breach of contract and fraud. It is ORDERED that these claims are dismissed with prejudice.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendants pay Plaintiff [$250,000.00]. IT IS ALSO ORDERED, ADJUDGED AND DECREED that Defendants pay pre-judgment interest on the amount of this judgment in the amount of ten percent (10%) per annum, beginning from May 7, 1992, and ending on the day before the judgment is signed. IT IS ALSO ORDERED, ADJUDGED, AND DECREED that Defendants pay post-judgment interest in the amount of 10% per annum, beginning on the day this judgment is signed, until paid by Defendants.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that costs of suit in the amount of $42,582.75 be taxed against the Defendants T2 Medical, Inc. and

Extendacare Health Systems, Inc., exclusive of costs of collection of judgment, for which let execution issue.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that should Defendants pursue an appeal of this judgment, Plaintiff recover the following from Defendants:

Appeal to the Fifth District Court of Appeals	$10,000
Filing of Writ of Error to the Supreme Court of Texas	$ 3,000
If Writ of Error is granted by the Supreme Court of Texas	$ 7,500
Filing of Petition for Writ of Certiorari to the United States Supreme Court	$ 2,500
If Petition for Certiorari is granted by the United States Supreme Court	$25,000

These fees are reasonable and customary for handling appeals in state and federal courts for Dallas area attorneys. Post judgment interest in the amount of 10% per annum will begin to run on each amount at the time each applicable phase of the appeal is filed.

All other relief not expressly granted herein denied.

SIGNED this 9 day of Dec., 1994.

/s/ Eric Moye
DISTRICT JUDGE

APPENDIX C

LOGO **THE SUPREME COURT OF TEXAS**
Post Office Box 12248
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January 29, 1998

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Mr. Christopher M. Ashby
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Dallas, TX 75270

RE: Case Number 97-0272
Style: GLORIA GISCH
v.
EXTENDACARE HEALTH SYSTEMS, INC. and
T2 MEDICAL, INC.

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error with the notation "Writ Denied".

Sincerely,

John T. Adams, Clerk

by /s/ Michael Kopp
Michael Kopp, Deputy

APPENDIX D

42 U.S.C.A. § 2000e-5(g)-5(k)

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(2)(A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

(B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court –

> **(i)** may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and
>
> **(ii)** shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

(h) Provisions of chapter 6 of title 29 not applicable to civil actions for prevention of unlawful practices

The provisions of chapter 6 of title 29 shall not apply with respect to civil actions brought under this section.

(i) Proceedings by Commission to compel compliance with judicial orders

In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section, the Commission may commence proceedings to compel compliance with such order.

(j) Appeals

Any civil action brought under this section and any proceedings brought under subsection (i) of this section shall be subject to appeal as provided in sections 1291 and 1292, Title 28.

(k) Attorney's fees; liability of Commission and United States for costs

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

APPENDIX E

LOGO **THE SUPREME COURT OF TEXAS**
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March 05, 1998

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RE: Case Number 97-0272
Court of Appeals Number: 05-95-00601-CV
Trial Court Number: 92-5861

Style: GLORIA GISCH
v.
EXTENDACARE HEALTH SYSTEMS, INC. and
T2 MEDICAL, INC.

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Sincerely,

John T. Adams, Clerk

by /s/ Michael Kopp
Michael H. Kopp, Deputy